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Reply comments of Telaleasing Enterprises, Inc. **CC Docket No. 96-128**
Filed July 15, 1996

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	CC Docket No. 96-128
Implementation of the	)	
Pay Telephone Reclassification	)	
and Compensation Provisions of the	)	
Telecommunications Act of 1996	)	

REPLY COMMENTS OF TELALEASING ENTERPRISES, INC.

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July 15, 1996

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I. INTRODUCTION

Telaleasing Enterprises, Inc. ("TEI") is the nation's third largest independent payphone service provider ("PSP"), owning and operating approximately 15,000 payphones in 21 states and the District of Columbia. The Company has been actively involved in the independent payphone industry virtually since its inception and, as a wholly-owned subsidiary of Davel Communications Group, Inc. ("Davel"), is one of four publicly-owned independent PSPs. Davel's Common Stock trades on the Nasdaq National Market System under the symbol DAVL.

TEI has reviewed the Reply Comments filed in response to the Commission's Notice of Proposed Rulemaking, FCC 96-254, released June 6, 1996 in the above captioned docket (NPRM), and hereby respectfully submits its reply comments for the Commission's consideration.

II. FEDERAL INTERVENTION IS NECESSARY TO ENSURE FAIR COMPENSATION FOR LOCAL COIN CALLS

In its NPRM the Commission sought comment on ways to discharge its responsibilities under §276 of the Communications Act of 1934[1], as added by the Telecommunications Act of 1996[2] (the "Act"). As FCC Chairman Reed E. Hundt pointed out in his separate statement which accompanied the NPRM "The Act gives us clear direction that we must ensure that payphone providers receive fair compensation for *each call* generated by a payphone" (emphasis added).[3] The NPRM sought comment on a range of alternatives, including possible action at the state and federal levels.

Chairman Hundt emphasized that proponents of aggressive federal intervention with respect to local coin rates must make a "strong case as to why such intervention is

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[1] 47 U.S.C. 151 *et seq.*

[2] Pub. L. No. 104-104, 110 Stat 56 (Feb 8, 1996) (the "Act")

[3] Separate Statement of Chairman Reed Hundt, NPRM. ("Statement")

necessary."[4] A review of the filed comments reveals that a strong case has, in fact, been made by the proponents of federal intervention, and certain respondents have clearly demonstrated that "...fair compensation cannot be achieved through the combination of their current coin rates, operator service-related revenues, and per-call-compensation for access code and 800 number calls."[5] In particular, the Commission has asked why lower payphone revenues resulting from low local phone rates in particular states should be a matter of federal rather than state concern. Several respondents have pointed out that low local phone rates require PSPs in many instances to provide service at prices which do not recover the cost of providing the call, and, as pointed out in the comments of the American Public Communications Council (the "APCC") has resulted in upward pressure on rates relating to interstate coinless calls in an attempt by PSPs to recover economic losses caused by low local coin rates. Low local coin rates and their effect on interstate coinless call rates are clearly a matter of federal concern in keeping with both the Commission's mandate under the Act and its jurisdiction over interstate call traffic, compelling the Commission to intervene.

A review of the components of payphone revenue demonstrates how important the issue of local coin call rates is to independent PSPs. Chairman Hundt notes in the Statement that "...while local coin calls account for a high percentage of payphone call volume, they account for only a small minority of payphone revenues. The vast majority of payphone revenues are generated from other calls."[6] This statement is supported in the NPRM by data which found that local calls accounted for 80 percent of payphone call volume, while generating only one-sixth of payphone call revenues. TEI finds this data and analysis to be inconsistent with its historical experience and current market conditions. The APCC cites a data collection project conducted during the months of March, April and May 1996 which found coin call traffic to represent approximately 500 calls per month, approximately 71% of all calls, and to contribute approximately $150 per month to payphone revenues.[7] TEI finds this data as well to be somewhat inconsistent with its experience in that it appears to overstate coin call revenues currently being received by PSPs. TEI has long been one of the largest independent PSPs in the country and offers payphone services to a broad customer base representing various types of customers and locations, operating approximately 15,000

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[4] Id.

[5] Id.

[6] Id.

[7] Comments of The American Public Communications Council ("APPC Comments"), p. 5.

payphones in 21 states. During the years 1994 and 1995, TEI averaged approximately $120 in coin call revenues per month, representing 45% and 48% of total payphone revenues respectively. A statistical sample of TEI's payphones in service in June 1996 found that TEI's payphones averaged 372 coin calls, of which approximately 93% were local calls. The sample further found that local coin calls represented approximately 67% of all payphone calls. With the increasing volume of dial around access and 800 subscriber traffic driving down non-coin revenues, coin calls are currently accounting for approximately 50% of TEI's total payphone revenues.

It is incumbent on the Commission to ensure that PSPs receive fair compensation on this type of traffic which represents such a significant portion of payphone call volume and revenue, particularly in light of the fact, supported by several respondents to the NPRM, that in many geographical areas this service is being provided to the public by PSPs at an economic loss.

As noted by virtually all respondents to the NPRM, the pay telephone compensation provision of the Act directs the Commission to establish a compensation plan to ensure that all PSPs are fairly compensated for each and every completed intrastate and interstate (except 911 and TRS calls) call originating from their payphone. Bellsouth has correctly pointed out in its Comments that "To the extent...any State requirements are inconsistent with the Commission's regulations promulgated pursuant to §276(b)(1)(A), the Commission's regulations 'shall preempt such State requirements'."[8] Bellsouth further comments that allowing local coin rates to be set by states constitutes regulation and is "...unnecessary and...inconsistent with the deregulatory thrust of the Telecommunications Act of 1996."[9] Comments filed by Bellsouth and the RBOC Payphone Coalition make a convincing case that allowing the states to continue to regulate local coin rates would not be consistent with the Commission's mandate to preempt state requirements which are inconsistent with § 276(c) of the Act.

The RBOC Payphone Coalition observes that "...the Commission has itself recognized that prices set by a competitive market benefit the general public and are by definition fair

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[8] **Comments of BellSouth Corporation, p. 2.**

[9] **Id., p. 3.**

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prices."[10] TEI agrees that the market, not regulation should determine the local coin rate.

III. FAIR COMPENSATION SHOULD APPLY TO ALL CALLS AND INCLUDE A REASONABLE RATE OF RETURN

In its Comments to the NPRM, Communications Central, Inc. ("CCI") notes that the Commission's tentative conclusion "...that its mandate under § 276(b)(1)(A) is to 'ensure that PSPs are "fairly compensated" for "each and every completed intrastate and interstate call" regardless of whether the PSP currently receives compensation for the particular call originated by its payphone'."[11] TEI asks the Commission to consider carefully this statutory language and supports the conclusion of Peoples Telephone Company, Inc. ("PTEL") that "...the language used in Section 276 is clear, no additional Commission interpretation is appropriate. The Commission's regulations should utilize the language 'each and every' to mean just that -- with only the two limited exceptions provided in the statute."[12]

The APCC make several relevant arguments relating to the issue of fair compensation for all calls. The APCC concludes that "As a matter of logic and equity, as well as Section 276's statutory command, each type of call should generate an appropriate contribution to fair compensation."[13] The Commission must not interpret the statutory language to mean that fair compensation on payphones is to be determined in the aggregate. The APCC continues "Failure to ensure fair compensation for any particular group of calls would be a legal error."[14]

PSPs must receive fair compensation each time a call is placed on their equipment. TEI also supports the APCC's conclusion that fair compensation must be prescribed for local directory assistance calls ("DA"). As the APCC correctly points out, PSPs "...are subject to varying charges and regulations for DA and generally cannot recover any contribution to

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[10] **Comments of the RBOC Payphone Coalition, p. 20.**

[11] **Comments of Communications Central, Inc. To Notice of Proposed Rulemaking, p. 20.**

[12] **Comments of People's Telephone Company, Inc., p. 14.**

[13] **APPC, supra, p. 13.**

[14] **Id.**

reflect the use of the payphone...In some jurisdictions, IPP providers are allowed to charge the caller a coin deposit for DA calls. In other jurisdictions, they are prohibited from doing so, even though they may incur a charge by the LEC. Even where IPP providers are allowed to charge a coin deposit for local DA, the charge generally may not exceed the LEC's charge for the service. Thus, there is no contribution to reflect the use of the payphone."[15] TEI believes the Commission should find this a compelling argument in favor of fair compensation for DA calls.

TEI shares the conclusion reached by the Commission that there is no evidence of congressional intent to leave international calls uncompensated and supports the Commission's tentative conclusion that it should exercise its "...general jurisdiction under Sections 4(1) and 201(b) of the Communications Act of 1934, as amended, to ensure that PSPs are compensated for international as well as interstate and intrastate calls originating from their payphones in the United States."

The APCC comments related to the definition of "fair compensation" are also on target. The APCC notes "...in several places the NPRM suggests that the appropriate measure of 'fair' compensation is whether revenue covers the 'marginal cost' of a call. Notice nn. 54, 56. This idea is clearly mistaken. First, cost is not the issue; the statute requires 'fair' compensation, which embraces more than cost recovery. Further, reliance on a simplistic marginal cost standard would in any event be a serious error of law and policy...If a payphone provider's revenue on each call covered only the marginal cost of that call, no payphone provider could stay in business."[16]

Under § 276(b)(1) of the Act, the Commission has been directed to take all action necessary to "promote competition among payphone service providers and promote the widespread deployment of payphone services to the benefit of the general public."[17] This mandate can only be met by prescribing compensation which provides PSPs with reasonable profits to reinvest in new payphone assets and thereby assist in carrying out the Act's goals. As publicly-held companies, Davel, TEI's parent company, and other publicly-held PSPs also have a fiduciary obligation to meet their stockholders' expectation for a reasonable rate of return on the company's assets and their own investment.

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[15] **Id. p. 22.**

[16] **Id. p. 11.**

[17] **The Act, §217**

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The comments filed by a number of interexchange carriers (IXCs) in this action propose that the per call compensation amount be based on the marginal cost of providing service. This idea must be rejected as clearly inadequate. For years, PSPs have been forced to give IXCs access to their equipment for little or no compensation. Comments filed by the APCC, The RBOC Payphone Coalition, PTEL, CCI and others document the explosive growth of dial around access and 800 subscriber traffic in recent years. PSPs have complied with their mandate to provide this service to the public for little or no compensation, while the IXCs were making profits on each and every call placed on equipment owned by the PSPs.

The IXCs have for years received a windfall at the expense of the PSPs in the form of access and 800 subscriber traffic. Comments filed by PSPs in this action clearly demonstrate the erosion of their own OSP traffic while also documenting the explosion in non-compensated calls placed on PSP equipment. All of this traffic created profits for the IXCs while the PSPs were forced to pay the costs. All businesses are entitled to a fair and reasonable profit. PSPs have always been entitled to share in the profits generated for the IXCs from PSP equipment as a matter of simple business practice and fundamentals but have been continually denied the opportunity. For a per call compensation program to be "fair" it must contain elements which not only provide for recovery of costs incurred by PSPs, but also provide a reasonable rate of return to PSPs for the use of the equipment utilized in generating the profits for the carrier of the call. For the program to be truly "fair", the Commission should also require IXCs to provide compensation for 800 subscriber calls for periods retroactive to the date of the decision in 1992 of the United States Court of Appeals for the District of Columbia Circuit which found no reason to distinguish between the routing of access code calls and 800 subscriber calls.[18]

The proposals filed by Sprint and other IXCs that PSPs are entitled only to a per call compensation amount based on the marginal cost of providing service are wholly without merit and must be rejected. Per call compensation must include allowance for a fair and reasonable return to the PSPs owners and stockholders.

IV.THE COMMISSION SHOULD ORDER INTERIM COMPENSATION FOR 800 SUBSCRIBER CALLS AND INCREASE CARRIER ACCESS CODE COMPENSATION

[18] **Florida Public Telecommunications Ass'n v. FCC, 54 F.3d 857 (D.C. Cir. 1995)**

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Like other PSPs responding to the NPRM, TEI has experienced tremendous growth in the number of access code and 800 subscriber calls placed from its payphones. TEI strongly agrees with the comments of CCI in that "Current compensation levels for access code calls do not provide the 'fair compensation' required under the Act." CCI goes on to note "...with the introduction of 800 number portability, the popularity of 'personal 800 numbers' and the development of '888' calling, the number of uncompensated subscriber 800 calls is continuing to grow at an unparalleled rate."[19]

In the statistical sample of its payphone traffic in June 1996, TEI concluded that access code calls placed on its payphones represented 37 completed calls per phone, and 800 subscriber calls placed on its payphones represented 87 completed calls per phone. Access code and 800 subscriber calls represented *83%* of all coinless calls placed on its phones during the month, and *24%* of all calls, including coin calls. During the twelve month period ending April 30, 1996, TEI has seen its long distance revenues per phone per month decrease by over *23%* from long distance revenue levels achieved in calendar year 1994.

Supported by TEI's data and that filed by other PSP respondents like the APCC, PTEL and CCI, the Commission must carry out its mandate under the Act and prescribe interim compensation effective the date of the NPRM and immediately increase the amount of interim compensation being paid on access code calls. TEI supports the approach proposed by PTEL in its proposal to base the amount during the interim period on a flat rate formula. TEI shares PTEL's position that a per call scheme "...may simply not be feasible, given the scope of the undertaking necessary and the need to expedite immediate interim compensation effective with the adoption of this NPRM. The Commission should instead consider building upon the existing compensation structures already in place...This interim compensation will provide a safety net for PSPs if procedural problems arise in extending per call compensation to 800 subscriber calls in the Commission's new rules. Moreover, by basing the interim compensation system on established interexchange carrier ("IXC") allocations and payment norms, this compensation system can be readily implemented. Indeed, it is in the public interest to expedite the establishment of this interim compensation mechanism, to ensure continued quality public payphone service."[20]

TEI believes that, in the final rulemaking, the only truly "fair" method for compensating PSPs for dial around access calls is one which pays the PSP a market-based

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[19] **Communications Central** *supra*, p. 6.

[20] **People's Telephone,** *supra*, p. 11

commission on the gross call revenue, and that the only truly "fair" method for compensating PSPs for 800 subscriber calls is one which pays the PSP the highest allowable local coin rate. However, the logistical problems associated with a program such as this would preclude its adoption in the short term.

It is TEI's belief and, in fact, experience that procedural problems will arise if the PTEL proposal is not followed in prescribing interim compensation. Since the date of the FCC's approval for certain IXCs to pay per call compensation on access code calls, TEI has continually experienced problems in collecting compensation due from carriers approved to pay on a per call basis. TEI's internal data demonstrates that IXCs currently paying on a per call basis are paying for only a small percentage of the calls on which compensation is due, and TEI has been continually frustrated by an ineffective dispute resolution mechanism.

Because the data filed by PTEL, CCI and the APCC on current levels of access code and 800 subscriber traffic so closely parallel the data compiled by TEI, TEI believes that it is an accurate indication of the current level of such traffic in the industry as a whole. With the erosion of PSP profitability so clearly demonstrated by PTEL and CCI, TEI believes that the Commission must immediately intervene to ensure the sustained financial viability of independent PSPs by prescribing an appropriate level of interim compensation while final decisions are made regarding fair compensation levels over the long term. PTEL has made a strong argument that an interim per call rate of $0.45 is appropriate and provides PSPs with a reasonable interim rate of return, citing the fact that the Commission itself set the access call rate at $0.40 per call in 1992.[21] Given the fact that PTEL's documented call volume so closely parallels that being experienced by the industry, TEI would urge the Commission to adopt the PTEL proposal and formula for calculating interim compensation and set such compensation at a level of $38.70 per payphone per month for 800 subscriber calls and $19.35 per payphone per month for carrier access code calls.

In adopting an interim mechanism, the Commission must bear in mind that this level of compensation reflects current market activity. With the volume of access call and 800 subscriber traffic from payphones increasing on a monthly basis, the Commission may be required to review this formula for fairness if a permanent, fair, mechanism is not in place within a few months after its adoption.

TEI agrees with CCI in its filed comments that "Receipt of interim compensation for

[21] **People's, *supra*, p. 8**

coinless calls is crucial for independent PSPs due to the explosive growth of dial-around calling and the resulting negative financial impact. The Commission should make such interim compensation effective as of the release date of the NPRM."[22]

[22] **Communications Central,** ***supra,*** **p. 11.**

V. THE COMMISSION SHOULD ADOPT A "CARRIER-PAYS" SYSTEM AND REQUIRE INDEPENDENT VERIFICATION OF PAYMENT

In Section 28 of the NPRM, the Commission correctly concludes that either a "carrier-pays" or a "set use fee" system would satisfy the requirements of the Act as they relate to payment for non-coin payphone calls. TEI further supports the Commission's tentative conclusion that a "carrier-pays" mechanism represents the preferable system due to the lower transaction and administrative costs resulting from the IXCs' ability to aggregate payments to payphone providers. TEI believes that several proponents of the "carrier-pays" system have made credible arguments for the adoption of such a mechanism.

TEI supports the use of the current direct-billing arrangement with modifications. TEI supports the proposal of PTEL requiring "...all facilities-based OSPs, and the intrastate interexchange operations of LECs, to send back to each PSP a statement indicating the number of 800 subscriber and access code calls that each carrier has received from each of that PSP's payphones."[23] TEI also agrees that remittance of billings should be done on a monthly, rather than quarterly, basis and that the Commission should impose minimum regulatory guidelines to resolve disputed ANIs and disputes over call counts in a per-call compensation environment. As stated earlier, TEI and other PSPs have encountered significant difficulty in collecting the appropriate amounts of access call compensation and has been continually frustrated by the current dispute mechanism. For this reason, IXCs should also be required to pay interest on unpaid balances later found to be compensable.

While TEI is also a strong advocate of establishing a system which requires independent verification of payments made to PSPs for access code and 800 subscriber traffic, TEI would urge the Commission to require independent verification of payments on no less than a quarterly basis, rather than the annual basis envisioned in the NPRM.

VI. CONCLUSION

While there are many issues set forth in the NPRM and numerous and differing positions filed by respondents relating to those issues, it is TEI's belief that the issues set forth in this reply are those that are the most central to the continued survival of many PSPs, some of which are publicly owned companies. This industry was spawned a decade ago in a

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[23] **Peoples's, *supra*, p. 26.**

deregulatory thrust which was meant to foster competition among PSPs and serve the public interest. Congress has now directed the Commission to take action to develop a comprehensive payphone compensation plan that provides fair compensation for PSPs on each and every completed call that originates from their payphones and thereby promote widespread deployment of payphone services to the general public in furtherance of the goals set forth in the Act.

TEI believes that for the Commission to meet its mandate under the Act, it must effectively resolve all the issues set forth in the NPRM which were not discussed in this reply in a manner which promotes fair competition, along with pursuing the following course of action:

A. As a result of the compelling arguments made in response to the NPRM, the Commission must intervene to ensure fair compensation for local coin calls placed from payphones by requiring that market forces, not regulation, should determine local coin rates.

B. The Commission must interpret the meaning of "fair compensation" to include an allowance for a reasonable rate of return to PSPs on *each* and *every* call.

C. The Commission must order interim compensation, effective on the date of the NPRM, for 800 subscriber calls and increase current carrier access code call compensation to a fair level.

D. The Commission must adopt a "carrier-pays" compensation system requiring remittance of billings on a monthly basis and require independent verification of payments on no less than a quarterly basis.

Respectfully submitted,
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